ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED JANUARY 8, 2003)
(EXCEPTIONS DUE 1-30-03)
(REPLIES TO EXCEPTIONS DUE 2-21-03)

FEDERAL MARITIME COMMISSION

DOCKET NO. 02-12

BERNARD & WELDCRAFT WELDING EQUIPMENT

V.

SUPERTRANS INTERNATIONAL, INC.

Respondent, an NVOCC, found to have violated section 10(d)(1) of the Shipping Act of 1984 by refusing to release cargo to the consignee-buyer in Singapore hoping to coerce the complainant exporter or the consignee to induce a third party in Singapore to pay alleged debts owed to respondent in connection with unrelated earlier shipments. Although respondent ultimately released the cargo, complainant seller was deprived of the sales price for many months and is awarded reparations for the value of the loss of that money, which is approximately $310. Complainant is also awarded $12,587.50 in attorney's fees, as authorized by section 1 l(g) of the Act.

Because respondent has terminated its NVOCC business, it is not necessary to issue a cease and desist order nor to suspend or revoke its license in this complaint proceeding.

Edward D. Greenberg and *Michael P. Coyle* for complainant.
David Lee, respondent's president, for respondent.

INITIAL DECISION' OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

As explained below, complainant and respondent have submitted their evidence and arguments and complainant has filed a motion for summary judgment based on this material together with a petition for attorney's fees. Complainant is asking for judgment against respondent and is seeking compensation for the loss of the value of the sales price of goods sold by complainant to a buyer in Singapore during the time that that price was not paid because of respondent's refusal to release the cargo at destination timely without just cause. For the reasons given below I am granting the motion and petition.

Complainant is Bernard & Weldcraft Welding Equipment (B & W), a manufacturer and exporter of welding equipment. Respondent is Supertrans International, Inc. (Supertrans), a former licensed and bonded ocean transportation intermediary operating as a nonvessel operating common carrier (OTI-NVOCC).

In its original complaint, B & W alleged that respondent Supertrans, had demanded extra money beyond the lawful rates and had refused to deliver the cargo to the buyer-consignee in Singapore, Lincoln Machinery Pte, Ltd. (Lincoln), until being paid such additional money. B & W alleged that such conduct violated sections 10(b)(2)(A) and 10(d)(l) of the Shipping Act of 1984, which require carriers to charge only their tariff rates and to observe reasonable practices relating

'This decision will become the decision of the Commission m the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

to the handling and delivery of property, respectively.[2] B & W asked for an order that Supertrans release the cargo, an order that Supertrans cease and desist from such unlawful conduct, an order suspending Supertrans's license for 90 days, and an order that Supertrans establish and put in force such practices as the Commission would determine to be lawful, just and reasonable.

Respondent Supertrans, which is not represented by counsel but rather by its president, Mr. David Lee, and is thus acting "pro se," failed to file its answer to the complaint timely and consequently fell into default. Supertrans was duly notified of this fact and ordered to explain why it had failed to tile its answer on pain of suffering a possible adverse default judgment. B & W was also ordered to clarify certain matters in its complaint relating to B & W's standing mainly as regards its section 1 O(b)(2)(A) allegations. See Notice of Default and Order to Clarify Complaint, September 3, 2002. By letter dated September 9, 2002, Mr. Lee explained why he delayed answering the complaint, denied the allegations made against Supertrans and explained the circumstances surrounding the dispute. In the interests of fairness and the strong policy of deciding cases on evidence rather than on defaults that both the Commission and the courts follow, I set aside Supertrans's default and referred the case to the Commission's Dispute Resolution Specialist, Mr. Ronald D. Murphy, for an attempt at mediation pursuant to the Commission's strong policy favoring alternative dispute resolution. See Respondent's Default Set Aside; Proceeding

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[2] Section 10(b)(2)(A) of the 1984 Act provides m pertinent part:

> (b) No common carrier. . . directly or indirectly, may-
> (2) provide service in the liner trade that-(A) is not in accordance with the rates, charges, classifications, rules and practices contained in a tariff published. . . under section 8 of this Act;

Section 10(d)(1) of the 1984 Act provides in pertinent part:

> (1) No . . . ocean transportation mtermediary , . . may fail to establish, observe, and enforce Just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Temporarily Held in Abeyance Pending Consideration of ADR, September 25, 2002. However, despite Mr. Murphy's efforts and consultation with both parties, on December 10, 2002, he advised that no settlement was possible and recommended that the decision in this case be expedited. On the basis of the record as then developed it appeared that the least costly and most efficient way to reach a decision on the merits of the dispute was for B & W to file a motion for summary judgment on any of its unresolved claims, to which motion Supertrans could reply. Moreover, because Mr. Lee had advised both Mr. Murphy and this judge that he was winding down Supertrans's NVOCC business by the end of December 2002, it did not appear that Supertrans would wish to seek court review of any adverse Commission decision and therefore, as was done in several previous Commission decisions where there was either a default or no likely appeal to a court, I waived the 60-day time period which would normally bar a successful complainant from petitioning the Commission for attorney's fees and ruled that B & W could file its petition for attorney's fees, which are allowed pursuant to section 1 l(g) of the 1984 Act, with this judge. In that way the Commission would have a complete decision on all B & W's claims to review if the Commission so chose instead of piecemeal initial decisions on the main reparations claim and, later, on the claim for attorney's fees. See Procedure Established to Supplement Record and to Facilitate Decision, December 11, 2002, and cases cited at page 6 note 2. Under this type of procedure, if B & W were to obtain a favorable judgment, B & W could present all its claims to Supertrans's surety without avoidable delay.

Without waiting for B & W's motion to be filed and served, Mr. Lee, for Supertrans, by letter dated December 13, 2002, confirmed the fact that Supertrans was closing down its NVOCC business by the end of the year 2002 or earlier and also further explained the dispute with B & W. I thereupon advised Mr. Lee that he had acted prematurely and was entitled to reply to B & W's

motion, which he had not yet seen, and could challenge B & W's request for an award of attorney's fees pursuant to 46 C.F.R. 502.254(d) and 502.254(b). See Explanation of Procedure to be Followed After Service of Complainant's Motion for Summary Judgment, December 17, 2002. Finally, because the record did not yet specify the exact amount of reparations sought by B & W but rather provided basic data, I advised Mr. Lee and B & W that the tentative amount of reparations being sought by B & W was only some $500 or so based upon the Commission's method of calculating interest pursuant to 46 C.F.R. 502.253. See Special Notice Regarding Calculation of Complainant's Claim for Reparations, December 18, 2002.[3]

What B & W is Now Alleging and Claiming

Because of developments occurring after the filing of B & W's complaint, B & W has dropped several of its original claims and requests for relief. Thus, because respondent Supertrans released the cargo to the consignee in Singapore after the filing of the complaint and charged the proper rates, B & W is no longer claiming that Supertrans violated section 10(b)(2)(A) of the Act, nor is B & W claiming that Supertrans had "converted" the goods in question so that Supertrans should be ordered to pay the value of those goods, some $25,000.[4] Similarly, because Supertrans

[3] In the notice, I assumed that interest would run to the Commission's final decision as is normally the case under 46 C.F.R. 502.253. However, as I explain below, this is not a normal case because respondent has released the goods in question, in effect, mitigating damages Consequently, the only remaining damages comprise the interest on the sales price, which interest does not run after the goods were released and complainant was paid the sales price. Therefore, the $500 estimate was excessive.

[4] If a carrier fails to deliver goods to the proper owner or consignee, the carrier becomes liable for the value of the goods as a "converter." See 13 Am Jur 2d, *Carriers*, sec. 445 ("The nondelivery or misdelivery of goods by a carrier renders it subject to an action for the recovery of the goods or then value, or an action for breach of the contract to deliver the goods. Also a carrier may be liable for conversion of goods or for statutory penalties."). See also *Id*, sec. 449 ("The failure or refusal of a carrier to deliver goods in its possession to the consignee or owner on demand, without a lawful excuse, renders the carrier liable for conversion ").

has closed down its NVOCC business, B & W is no longer asking that Supertrans's license be suspended nor that Supertrans be ordered to cease and desist from continuing its unlawful conduct nor be ordered to establish just and reasonable regulations and practices relating to the handling and delivery of property. When an NVOCC closes its NVOCC business, it loses its surety bond and license.[5] Furthermore, B & W has decided not to pursue its claim for attorney's fees incurred over a period of many months while its attorney attempted to resolve the dispute with Supertrans without litigation. This type of attorney's fees claim, if it could be awarded under applicable law, would constitute an element of damages on account of Supertrans's violation of law as opposed to attorney's fees which are awardable in addition to a reparations award, as provided by section 11 (g) of the 1984 Act. As I advised B & W, an award of attorney's fees as an element of the money damages directly caused by a respondent's violation of the 1984 Act was allowed in only one extremely unusual case which was not followed in a subsequent case. Consequently, B & W has decided not to pursue this particular claim in the interest of avoiding delay. See Procedure Established to Supplement Record and to Facilitate Decision, December 11, 2002, at 7-8; B & W's Memorandum in Support of Motion for Summary Judgment at 2.[6] Accordingly, B & W is now actively seeking reparations for Supertrans's alleged violation of section 10(d)(l) of te Act, i.e., Supertrans's alleged unreasonable practice in refusing to release the cargo timely in Singapore,

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[5]Supertrans has advised both me and Mr. Murphy, the Deputy Director, Bureau of Consumer Complaints and Licensing, that it closed its NVOCC business at the end of December 2002. In the normal course of events the Commission's staff will process the revocation of Supertrans's license and cancellation of its bond.

[6]The only time m which the Commrssion awarded attorney's fees as part of the damages directly caused by a respondent's violation of the *1984* Act was m the case of *Bloomers of Cal, Inc v Ariel Maritime Group, Inc , 26* S.R.R. *183* (1992). In *Bloomers,* the respondent NVOCC had attempted to coerce shippers to pay excess freight and had brought suit m court against the shippers, forcing them to hire counsel to defend. After successfully defending in court, one shipper, Bloomers, filed a complaint against the NVOCC with the Commrssion, clam-kg that the NVOCC's unlawful Shipping Act practice had compelled the shipper to pay an attorney to defend m court. There has been no similar court litigation m the instant case. In a later case, namely, *Burlington Northern Railroad Co v M C Terminals,* 26 S.R.R 682 (1992), the Commission refused to follow the *Bloomers* precedent.

causing B & W to be deprived of the sales price of the goods for a considerable length of time. B & W is also seeking an award of attorney's fees relating to the preparation and filing of its complaint and subsequent litigation in this Commission proceeding. If B & W obtains a favorable decision on these claims, I am advised that it will present these claims to Supertrans's surety as permitted by law. See section 19(b)(2)(A) of the 1984 Act.

Use of the Summary Judgment Procedure to Rule Upon the Merits of B & W's Claims

In my previous ruling of December 17, 2002, I found that this case was suitable for decision by means of a summary-judgment procedure. The evidentiary record, as then developed, consisted of the original complaint, which was supported by two documentary attachments and was verified by B & W's Senior Accounting Specialist, Mr. Andrew Monk; a sworn statement by Mr. David Lee, president of respondent Supertrans; and B & W's memorandum supported by an affidavit of Mr. Monk with attached shipping documents and correspondence. Thereafter B & W submitted a memorandum in support of a motion for summary judgment supported by another affidavit of Mr. Monk and a petition for attorney's fees supported by an affidavit of Mr. Steven John Fellman, managing partner of the law firm of Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C., with billing records. Mr. Lee also submitted an unverified letter prematurely before B & W had served its motion for summary judgment, further explaining the circumstances surrounding the parties' dispute. Finally, I granted Mr. Lee's request to file a reply to the motion and petition, allowing him 20 days even though the normal time for replies to motions is only 15 days. See Respondent's Request for Adequate Time to Reply to Complainant's Motion and Petition Granted, December 20, 2002. By letter dated January 6, 2003, on behalf of Supertrans, Mr. Lee filed his reply to the motion

and petition, providing further explanation for his conduct. As has been his practice, Mr. Lee failed to verify the factual assertions in this letter and furthermore failed to serve counsel for complainant, although he was warned earlier that the Commission's rules require him to do so.[7] I therefore took the liberty of faxing a copy of this letter to counsel for complainant and submitted the original to the official record. As I explain below, even were I to accept the factual assertions made by Mr. Lee in his unverified letter as evidence, I do not find that they preclude issuance of summary judgment because they do not raise a dispute of material fact, i.e., the purported factual dispute, even if resolved in Supertrans's favor, would not affect the outcome of the case under applicable substantive law.

I am issuing the present decision as a summary judgment. In my previous ruling of December 11, 2002, establishing this procedure, I ruled that the parties would follow the procedure so that I could issue summary judgment, citing the Commission's rule (46 C.F.R. 502.12) that authorizes the use of the Federal Rules of Civil Procedure absent a specific Commission rule provided that the federal rules are consistent with sound administrative practice. The relevant Federal Rule is Rule 56, which authorizes courts to avoid trials when it appears that a case may be decided on the merits of a dispute on the basis of pleadings, affidavits, and other documents. In the words of Federal Rule 55(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

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[7] Mr. Lee is acting for his company without legal counsel, i.e., akin to "pro se." I have advised him that he must comply with the Commission's rules requiring verification of factual assertions and service on counsel for complainant as well as on the Commission's Secretary. See, e.g., Respondent's Default Set Aside, etc , September 25, 2002, at 6-7; Respondent's Request for Adequate Time to Reply to Complainant's Motion and Petition Granted, December 20, 2002, at 2. Mr. Lee has continually failed to follow the rules although he has been advised that his status akin to "pro se" entitling him to some indulgence does not give him a license to ignore the Commission's rules and that such conduct cannot be allowed to prejudice complainant.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In one of three cases decided by the Supreme Court in 1986, in which cases the Court encouraged greater use of summary judgments,* the Court in *Celotex Corp. v. Catrett, 477* U.S. 317, 327 (1986), stated:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine triable issue of material fact. Summary judgment is properly regarded not as a disfavorable procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action."

Summary-judgment procedures have been followed in numerous Commission proceedings under such circumstances as those in the instant case, i.e., when after the evidentiary record has been developed, it does not appear that one of the parties is able to offer credible evidence under the relevant substantive law that would permit a reasonable finder of fact to find for such party. In other words, in such a situation there is no need for a trial or further attempts to develop the evidentiary record. Among the Commission cases in which the summary judgment procedure was followed is *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk, Inc., 27* S.R.R. 1045, 1050-1054 (ALJ 1997). There is a detailed discussion of the basic principles of the summary-judgment procedure in that case.

To summarize some of these basic principles discussed in *McKenna Trucking*, the party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, the party opposing the motion is given the

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[8]The other two Supreme *Court* decisions were. *Matsushita Electric Industrial Co , Ltd v Zenith Radio Corp ,* 475 U.S. 574 (1986); and *Anderson v Liberty Lobby, Inc., 477* U.S 242 (1986).

benefit of favorable inferences, and the case must go to trial unless it appears that the party opposing the motion cannot prevail in any event and that the issue of credibility is therefore immaterial. *McKenna Trucking* Co., 27 S.R.R. at 105 1, quoting a leading authority. The courts have also imposed requirements on parties opposing motions for summary judgment. Thus, one authority states what a party opposing a motion for summary judgment must do to survive such a motion as follows:

> . . . this requires a showing of competent material reflecting admissible information that can be produced at trial and qualify as substantial evidence. In addition to establish that there is a genuine factual dispute for trial, of course, the nonmovant must be able to articulate a legal argument precluding summary judgment on the record before the court. (Footnote omitted.) *McKenna Trucking Co.* at 1053, quoting from 11 *Moore's Federal Practice* (3d ed.) at 56-l 52 and 56- 153.

Another authority on federal procedure has described what a party opposing a motion for summary judgment must do in order to defeat the motion and show that a trial is necessary. See 10A Wright, Miller and Kane, *Federal Practice and Procedure* (1998), sec. 2727 at 486 *et seq.* As explained by this authority, "if the movant makes out a prima facie case that would entitle him to a judgment as a matter of law if uncontroverted at trial, summary judgment will be granted unless the opposing party offers some competent evidence that could be presented at trial showing that there is a genuine issue as to a material fact." *Id.* at 486. This authority also states that the burden on the nonmoving party is not a heavy one. However, the nonmoving party is required to show that he has competent evidence disputing material facts, thus justifying a trial to resolve the conflicting evidence. Such evidence offered by the nonmoving party must also be material under the applicable substantive law. Thus, if such evidence, even if true, would not affect the outcome of the trial under the applicable substantive law, it would be a waste of time to go to trial and the movant is entitled

to summary judgment. The court in *Holloway v. Pigman, 884* F.2d 365, 366 (8th Cir. 1989), explained the summary-judgment procedure as follows:

> In reviewing the district court's grant of summary judgment, we must determine whether the record as it stands reveals any disputed issues of material fact. Fed. R. Civ. P. 56(c). To be material, the disputed facts must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. Anderson *v. Liberty Lobby, Inc., 477* U.S. 242. . . . The presence of a genuine issue of fact is predicated on the existence of a legal theory which can be considered viable under the nonmoving party's version of the facts. (Case citation omitted.) The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law. (Case citation omitted.)

See also *Bushie* v. *Stenocord Corp.,* 460 F.2d 116, 118-l 19 (9th Cir. 1972) (party opposing motion for summary judgment must show that his asserted version of the facts, if true, would entitle him to judgment under the applicable substantive law; 11 *Moore's Federal Practice,* cited above, sec. 56.13[4].

In *McKenna Trucking* Co., the value of the summary-judgment procedure was explained in these words (27 S.R.R. at 1053):

> Courts have stated that the purpose of the summary-judgment procedure is to pierce the pleadings and assay the parties' proof in order to determine whether trial is actually required. In *McCarthy v. Northwest Airlines, Inc., 56* F.3d 313, 314-315 (1st Cir. 1995), the court described the purpose of summary judgment and stressed the fact that the procedure was useful in saving costs and conserving limited court resources as follows: Summary judgment has a special niche in civil litigation. Its "role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." (Case citation omitted.) The device allows courts to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money, and permitting courts to husband scarce judicial resources. (Emphasis added.)

For some of the other Commission cases in which summary-judgment procedures have been followed so as to avoid costly trials and conserve limited resources of the parties and the Commission, see *NPR, Inc. v. Board of Commissioners of the Port of New Orleans, 28* S.R.R. 15 12, 15 17 (ALJ, administratively final, *2000); International Freight Forwarders and Custom Brokers Association of New Orleans v. LASSA,* 27 S.R.R. 392, 393-396 (ALJ 1995); *Application of Leslie Enterprises, Inc. for the Benefit of International Trade Operations,* 24 S.R.R. 146,153 (ALJ, FMC finality, 1987).

Applying the foregoing standards governing summary judgments, I find no genuine dispute of material facts and find that the evidence submitted by B & W in support of its motion for summary judgment shows that respondent Supertrans, by refusing to release the shipped goods in Singapore timely, interfered with the contract of sale between B & W and Lincoln, its buyer in Singapore, thereby depriving B & W of the sales price to which it was entitled for many months without just cause or excuse but rather the excuse that a third party known as Jenkar in Singapore owed Supertrans some money. In brief, the essential facts are as follows."

Summary of the Facts

In October 2001, B & W made a sale of welding equipment to Lincoln, at a price of $24,739.33. The shipment was booked with Supertrans, which issued an NVOCC bill of lading. The agreed freight charges were $1,125.80. The shipment was loaded at the Port of Long Beach, California and arrived in Singapore on or about November 7, 2001. Supertrans's delivery agent in

[9]The followmg findings of fact are drawn from the first Affidavit of Mr. Andrew Monk, B & W's Senior Account Specialist, except where otherwise indicated. The Monk Affidavit IS attached to B & W's Memorandum in Response to Order to Clarify Complamt, September 23, 2002.

Singapore, Altron Shipping Pte, Ltd. (Altron), issued an arrival notice to Lincoln, the buyer and consignee, requesting payment of the above sum. However, at the direction of Supertrans, Altron sent an amended arrival notice to Lincoln on November 12, 2001, demanding additional charges totaling approximately $5,123.20. This money was not owed to Supertrans by B & W nor by Lincoln but by a company known as Jenkar[10] with whom Supertrans had had business dealings in the past and who, according to Mr. Lee, president of Supertrans, owed the $5,123.20 since 1999 in connection with freight charges and Supertrans's handling fee on other shipments. See Mr. Lee's answering letter, dated September 9, 2002 ("Answer"), para. III. Furthermore, according to Mr. Lee, Supertrans had had an agency relationship with Jenkar but terminated it in July 2001 because of Jenkar's failure to pay Supertrans and Mr. Lee's belief that "Jenkar never really want to settle with Supertrans." *(Id.)* Nevertheless, Mr. Lee states that Supertrans agreed to handle the forthcoming B & W shipment because the head of Jenkar told Mr. Lee that Jenkar would pay Supertrans the outstanding amount owed if Supertrans would handle the shipment and would pay any new charges that would arise in connectron with the shipment. According to Mr. Lee, Jenkar became involved with the shipment because the consignee Lincoln had appointed Jenkar to be the handling agent. *(Id.)* However, according to Mr. Lee, on November 5, 2001, two days before the arrival of the shipment in Singapore, Mr. Lee learned that Jenkar was no longer Lincoln's handling agent in Singapore. *(Id.)*

Although the shipment had arrived in Singapore on November 7, 2001, Supertrans refused to allow the goods to be released to Lincoln unless Supertrans were paid the additional money owed to it by Jenkar. B & W believed that Supertrans was holding the cargo in order to induce B & W or

[10]The full name of this company is M/S Jenkar Freight Smgapore Pte, Ltd.

Lincoln, for whom Jenkar had formerly performed services, to pay the debt to Supertrans or to persuade Jenkar to pay the debt. In any event Supertrans's agent in Singapore, Altron, refused to release the cargo at the direction of its principal, Supertrans. In an effort to obtain release of the goods, both B & W and Lincoln retained counsel who repeatedly advised Supertrans that there was no legal support for Supertrans's position." B & W's counsel also contacted Mr. Joseph Farrell, the FMC's Director, Office of Consumer Complaints, who attempted to resolve the dispute unsuccessfully. According to Mr. Monk's understanding of the matter, Mr. Lee or his then attorney, Mr. Fang, admitted that Supertrans was withholding the cargo in order to put pressure on B & W and Lincoln to obtain the monies allegedly owed to Supertrans by Jenkar. During these discussions B & W waived its normal terms of sale requiring payment in 60 days of shipment to preserve a potentially new lucrative account with Lincoln and agreed that Lincoln would not have to pay for the goods until it received the cargo. See second Monk Affidavit attached to B & W's Memorandum in Support of Motion for Summary Judgment, as "Exhibit 1," at paras. 2, 3. Despite B & W's counsel's repeated contacts with Mr. Fang, Supertrans continued to withhold the cargo. Consequently, after some nine months of unsuccessful discussions, B & W authorized the filing of the instant complaint, which was done in early August 2002 and approximately three weeks after the complaint was filed, Supertrans released the cargo and was paid the originally agreed freight charges. See first Monk Affidavit at para. 9. B & W had extended the time for Lincoln to pay for the goods until August 26, 2002, and further extended the time until over eight months from the normal due

[11]See, e.g., the letter dated May 17, 2002, from B & W's counsel, Mr. Edward D. Greenberg to Mr. David Lee and others, urging Supertrans to release the cargo in Singapore and advising Supertrans that it and others involved were breaching their contracts, unlawfully converting the goods and were otherwise violating the Shipping Act and other statutes. This letter is attached to B & W's Memorandum clarifying the complaint, September 23, 2002, as "Exhibit C."

date, which would have been December 17, 2001 (60 days after loading in Long Beach, California), and was actually paid on or about November 1, 2002. *Id.*, at para. 3.[12]

As I explain below, in his reply to complainant's motion, Mr. Lee asserts without verification that Supertrans withheld release of the cargo in Singapore because it had not been paid by Lincoln, the consignee, and that Supertrans did not know that the seller, B & W, had not been paid by the buyer Lincoln. Even if this assertion is true, it would not justify Supertrans's refusal to release the shipment to Lincoln because Supertrans's delivery agent in Singapore made an unlawful demand on Lincoln to pay moneys allegedly owed to Supertrans by the third party Jenkar, a demand which Lincoln refused.

DISCUSSION AND CONCLUSIONS

As noted earlier, B & W's remaining claim is that Supertrans violated section 1 O(d)(1) of the 1984 Act. This law states in pertinent part as follows:

> (1) No . . . ocean transportation intermediary . . . may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

It is clear from Commission precedent that when Supertrans refused to release the cargo it had contracted to carry for B & W and Lincoln despite its lack of a valid legal excuse, it interfered with the contractual rights of the buyer and seller, Lincoln and B & W, and failed to observe just and

[12]The second Monk Affidavit contains an obvious typographical error in paragraph 3, where it is stated that the goods were shipped on October 18, 2002, and payment for them would have been due on December 17, 2002. The correct year is, of course, 2001. A similar error occurs in the first Monk Affidavit attached to the Memorandum in Response to the Order to Clarify Complamt, September 23, 2002, at para. 9.

reasonable practices relating to the handling and delivery of the subject shipment. Whatever grievance Mr. Lee and Supertrans had with the third party, Jenkar, which arose out of totally unrelated shipments in the past, did not give Supertrans any just reason whatsoever, in effect, to hold the cargo hostage in the hopes of inducing the innocent buyer and seller to put pressure on Jenkar to pay the alleged debt owed by Jenkar to Supertrans. Nor, of course, could Supertrans hold the cargo hostage while demanding extra freight money beyond that which had been agreed upon when the shipment was first booked. Unfortunately, this is not the first time that an NVOCC has held cargo hostage to its demands for more money which the innocent cargo owner had no legal obligation to pay and whenever such an NVOCC has acted in this manner, it has been held to have violated section 1 O(d)(1) of the 1984 Act as well as other sections of that law. Several Commission decisions in recent years amply illustrate this point.

In *Adair v. Penn-Nordic Lınes,* 26 S.R.R. 11 (I.D., F.M.C. notice of finality, 1991), a shipper of a motorcycle, located in Seattle, Washington, through his freight forwarder, booked the shipment to New Zealand, with Penn-Nordic Lines, an NVOCC. Penn-Nordic, having a dispute with the freight forwarder on account of previous alleged debts owned to Penn-Nordic by the freight forwarder, refused to deliver the motorcycle but instead abandoned it in California where it was placed in storage, refusing to deliver the motorcycle until being paid for the previous debts and also for the subject shipment, which latter payment was ultimately made. The shipper spent over a year and a half trying to locate the motorcycle and the NVOCC moreover reneged on his agreement to waive the storage charges. It was found that Penn-Nordic had refused to deliver the shipment in order "to pressure Corporate World [the freight forwarder] to pay its delinquent accounts as well as the instant account." (26 S.R.R. at 19.) It was also noted that the shipper's agent, the freight forwarder, had acted negligently and indeed was unlicensed in violation of the Shipping Act.

However, this was held not to be a valid excuse for the NVOCC to breach its contract of carriage, i.e., its duty to deliver, so that it harmed the innocent shipper. Although the NVOCC was finally paid its freight charges, the shipper never retrieved his motorcycle, was awarded the value of that motorcycle, among other damages, and the NVOCC was held to have violated section 10(d)(l) of the 1984 Act.

In two later cases involving NVOCCs who held cargoes hostage in order to extract more money from the shippers, the NVOCCs were held to have violated section 1 O(d)(1) of the 1984 Act plus other laws. See *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc., 28* S.R.R. 45 (I.D.), adopted, 28 S.R.R. 534 (FMC 1998), affirmed *sub nom. World Link Logistics, Inc. v. Federal Maritime Commission,* 203 F.3d 54 (D.C. Cir. 1999) (Table). In that case, the NVOCC refused to release the cargo to the importer in the United States, demanding about four times more freight money than the importer had been quoted by the NVOCC's agent plus additional storage charges on the grounds that the agent had not been authorized to quote the rates. The importer needed the cargo and therefore paid the moneys demanded but was later awarded them as reparations. In *William J. Brewer v. Saeid B. Maralan,* 28 S.R.R. 1331 (I.D. 2000), affirmed in relevant part, 29 S.R.R. 6 (FMC 2001), the NVOCC quoted a rate to the shipper, then refused to release the cargo in Alexandria, Egypt, demanding more money than originally quoted without any lawful authority to do so. The NVOCC was found to have violated section 1 O(d)(1) of the Act and was ordered to repay the freight money and to release the cargo on demand of the shipper on pain of possible future Commission or court proceedings should the NVOCC continue to withhold the cargo. (29 S.R.R. at 10.)

In the above three cases, the NVOCC refused to deliver the cargo to the shippers or consignees, making unlawful demands on them for more money, in effect holding the cargoes

hostage. Moreover, although the shippers paid the lawful freight, in these cases the NVOCC still failed to release the cargoes except for the *NVOCC* in *Total Fitness.* Furthermore, in the *Adair* case, the NVOCC refused to carry out its duty of delivery even though the NVOCC's grievance was not with the shipper or consignee but with the freight forwarder with whom the NVOCC had had problems with previous shipments. Thus, even if the consignee in Singapore, Lincoln, had appointed Jenkar as its handling agent (or freight forwarder) this provides no lawful excuse for Supertrans to blame the consignee or shipper and attempt to coerce the consignee or shipper to collect alleged debts owed to Supertrans by the third party, Jenkar, on earlier unrelated shipments. This practice is unjust and unreasonable, violates section 10(d)(l) of the Act and must be condemned in the strongest terms.

Respondent's Final and Earlier Defense

As mentioned above, Mr. Lee for Supertrans, by letter, asserts that Supertrans refused to release the cargo in Singapore in November 2001 because the consignee Lincoln did not pay the freight and that Supertrans did not know that B & W, the complainant seller, had not been paid for the goods under the sales contract.[13] In point of fact, however, it is undisputed that Supertrans did not release the goods in Singapore until about three weeks after B & W filed its complaint in August 2002 despite numerous entreaties from B & W's counsel, from Mr. Fang, Supertrans' then counsel, and after the advice of Mr. Farrell, the Commission's Director of the Office of Consumer

[13] "The evidence submitted by B & W, however, shows that Supertrans did know that B & W had not been paid by Lincoln and that consequently Supertrans was usmg this fact as part of its effort to coerce payment of the alleged Jenkar debt. See Memorandum m Response to Order to Clarify Complaint, September 23, 2002, at 7, citing first Monk Affidavit, para. 10. I need not resolve this factual dispute because even if Mr. Lee's factual assertion is true, which IS doubtful, Supertrans had no legal Justification to withhold release of the cargo in Singapore.

Complaints. It is also undisputed that Lincoln ultimately paid the freight as originally quoted and that Supertrans finally released the cargoes in August 2002.

The problem with Mr. Lee's belated defense is that even if I were to accept his unverified assertions as true, the verified statements of Mr. Monk that support the complaint establish that the consignee in Singapore, Lincoln, only declined to pay the moneys demanded by Supertrans because the demand included alleged debts owed by the third party Jenkar to Supertrans. Moreover, Lincoln made repeated offers to pay the original and proper freight but Supertrans's agent in Singapore, Altron, continued to refuse to release the cargo. See complaint, para. 4, verified under oath by Mr. Andrew Monk, Senior Account Specialist for B & W. Whatever legal justification Supertrans might have had under its rights to hold cargo until being paid what it was lawfully owed by the shipper or consignee, this justification does not authorize a carrier to hold cargo hostage in an attempt to extort from an innocent shipper or consignee moneys owed the carrier by a third party. Moreover, Supertrans's action in finally releasing the cargo to Lincoln in Singapore after the complaint was filed upon payment of the original and proper freight money and thereby surrendering its cargo lien supports the inference that Mr. Lee and Supertrans had not been asserting a cargo lien lawfully.[14] As I have discussed above, case law holds that in order to defeat a motion for summary judgment, the nonmovant, here Supertrans, must show that it has credible evidence under applicable

[14] A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is lawfully owed and has a cargo hen which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo. See *Johnson Products Co, Inc v M/V Molinera,* 628 F Supp 1240, 1248 (S.D N.Y. 1986); Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its hen, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted unlawfully, in violation of section 10(a)(1) of the 1984 Act. See *Waterman Corp v General Foundries, Inc ,* 26 S.R.R. 1173 (I.D.), affirmed with slight modifications, 26 S.R.R. 1424 (1994). Thus, disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.

substantive law and that such evidence would constitute a valid defense under such law. Otherwise the purported factual dispute is not material, i.e., even if resolved in favor of the nonmovant, such resolution would not support a favorable decision for the nonmovant, here, Supertrans. See the discussion and cases cited above regarding summary judgment and especially *Holloway v. Pigman,* 884 F.2d at 366 (the mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law).

Similarly, there are additional unclear matters in the record but again the matters involved are not material. Thus, in his letter-answer of September 9, 2002, Mr. Lee asserts that he agreed to take the shipment after being assured by Jenkar in Singapore that Jenkar would pay outstanding debts owed to Supertrans. However, two days before arrival in Singapore, Mr. Lee was advised that Jenkar no longer was working for the consignee, Lincoln. However, later, Mr. Lee states that he discovered that someone with Jenkar was still working on the shipment for Lincoln. Whether Jenkar was working on the shipment for Lincoln or not, Supertrans's dispute with Jenkar would not justify Supertrans harming Lincoln or B & W. Moreover, if Supertrans were a "victim" of Jenkar's false promises, as Mr. Lee states, Supertrans's recourse is against Jenkar, not Lincoln or B & W.

The Reparations Award

As noted earlier, B & W is seeking an award of money damages (reparations) for Supertrans's violation of section 10(d)(1) of the Act. Section 1 l(g) of the 1984 Act provides in relevant part that "the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury. . . ." Because Supertrans finally released the cargo to the consignee in Singapore, B & W is not seeking compensation for the

value of the goods. Rather it is seeking compensation for the loss of the sales money ($24,757.33) between the time that Supertrans should have released the goods in Singapore and the time it finally did release them. B & W claims that the goods should have been released on December 17, 2001, but were not released until August 26, 2002, a total of 252 days. (See second Monk Affidavit at para. 3., attached as Exhibit 2 to B & W's Memorandum in Support of Motion for Summary Judgment.) As B & W argues, the courts recognize that plaintiffs are entitled to recover the lost benefits of their contracts from wrongdoers who interfere with plaintiffs' contractual rights. See Memorandum in Response to Order to Clarify Complaint at 7, citing *Markowitz & Co. v. Toledo Metropolitan Housing Auth.,* 608 F.2d 699, 707 (6th Cir. 1979); and *Grace & Co. (Pacific Coast) v. Pittsburgh Testing Laboratory, 249* F.2d 165, 168 (9th Cir. 1957). More directly under shipping law, Supertrans's unreasonable withholding of the shipment in the hope of extracting extra moneys unlawfully from the shipper or consignee caused the buyer Lincoln to withhold paying B & W and thereby was the foreseeable cause for B & W to be deprived of the sales price. See *Tractors and Farm Equipment Ltd. v. Cosmos Shipping* Co., *Inc.,* 26 S.R.R. 788 (1992) (thn-d party freight forwarder mishandled booking with result that right to early delivery to consignee in India under sales contract was violated, resulting in vastly increased import duties in India for which reparations were awarded.) The next question is the measure of B & W's "actual injury."

Normally a complainant suffers discrete financial injury at a certain time and when it obtains an award of reparations to compensate for this lost money, the Commission awards the lost discrete amount plus interest from date of injury up to 15 days after a final Commission decision. See 46 C.F.R. 502.253. In the instant case Supertrans released the goods in Singapore on August 26, 2002, although B & W was not actually paid the sales price until November 1, 2002. However, B & W is not seeking compensation for any time after August 26, 2002, which is 252 days after the

date the goods should have been released in Singapore. (See second Monk Affidavit at para. 3.) B & W is thus claiming compensation for the 252 days that it lost the use of the $24,757.33. Had B & W received the money when first it was due on December 17, 2001, as B & W had agreed with Lincoln, in theory B & W would have been able to invest this money and earn interest. B & W's actual injury therefore was the loss of this interest for the 252-day period. The Commission measures interest on the basis of the average monthly secondary market rate on six-month Treasury bills. See 46 C.F.R. 502.253(a). According to the Commission's responsible official who did the calculation, the interest on the sales price for 252 days amounts to $3 10.98. I officially notice this amount. See 46 C.F.R. 502.226(a). This is the award of reparations for B & W's "actual injury." This is so because Supertrans released the goods in Singapore on August 26, 2002 and B & W is waiving additional interest up to November 1, 2002, when it actually received payment. In effect, Supertrans has mitigated the money damages it caused and B & W, having received the sales price, no longer suffers any "actual injury" beyond the date it now claims, August 26, 2002.

Accordingly, respondent Supertrans is ordered to pay B & W reparations in the amount of $3 10.98.

Complainant's Petition for Attorney's Fees

As I noted earlier, I allowed B & W to file its petition for attorney's fees together with its motion for summary judgment although the normal procedure under the Commission's rules is for a successful complainant to wait 60 days before filing such a petition. Thus, the relevant Commission rule allows such a complainant to file his petition "within 30 days of a final reparation award" but he must first await a final award which does not occur until "the time for the filing of

court appeals has run or after a court appeal has terminated." See 46 C.F.R. 502.254(c)(l) and 254(c)(2). (The statute governing appeals to courts is the so-called Hobbs Act, 28 U.S.C. sec. 2344, which provides for an aggrieved party to seek judicial review within 60 days.) The Commission's rule also provides that petitions for attorney's fees are to be filed with the Commission "if exceptions were filed to, or the Commission reviewed, the presiding officer's reparation award decision pursuant to sect. 502.227 of this part." 46 C.F.R. 502.254(c)(1)(ii). Nevertheless, in previous cases when it appeared that an aggrieved respondent would not be likely to seek judicial review of a final decision of the Commission, the rule requiring complainants to wait 60 days after a final Commission decision has been waived and, indeed, in some cases, the presiding judge has issued an initial decision both on the issue of violations and reparations plus the petition for attorney's fees as well. See *Tampa Bay International Terminals, Inc. v. Coler Ocean Independent Lınes Co., 28* S.R.R. 1390 *(2000); Classic International Inc. v. Young Hee Ko, et al., 28* S.R.R. 1086 (1999). In these two cases the respondents fell into default so that there was no likelihood of a court appeal nor of respondents' filing exceptions to the Initial Decision. The issuance of an Initial Decision by the presiding judge on both the violations and attorney's fees claims thus accelerated a final decision on both issues and enabled the successful complainants to seek immediate relief by claiming against respondents' bonds as authorized by section 19(b)(2)(A) of the 1984 Act. The Commission made the Initial Decisions in both cases administratively final notwithstanding the fact that the petition for attorney's fees was filed with the judge without petitioners waiting to see if there would be a petition for court review or exceptions to the Initial Decisions. Waivers ofprocedural rules by administrative agencies are sanctioned by the courts when there could be no substantial prejudice to a party. As the Supreme Court stated in *American Farm Lines v. Black Ball Freight Service, 397* U.S. 532, 539 (1970):

> [i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends ofjustice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. (Case citations omitted.)

There will be no substantial prejudice to respondent if I were to rule upon both the petition for attorney's fees as well as the issue of violations because respondent was granted time to reply to the petition and the motion 20 days after the motion and petition were filed, thus satisfying the Commission's rules as to replies to these two pleadings. (See 46 C.F.R. 502.74(a)(2) (15 days to reply to motions) and 46 C.F.R. 502.254(d) (20 days to reply to petitions for attorney's fees)." Furthermore, if respondent does decide to tile exceptions, the Commission will have the benefit of this judge's views on the question before having to decide the matter afresh. Thus, the Commission may be able to avoid the problem that it encountered in *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.,* 28 S.R.R. 1373 (FMC 2000), a case in which the losing respondent filed exceptions and sought court review unsuccessfully and the prevailing complainant, following the relevant Commission rules, filed a petition for attorney's fees directly with the Commission. The Commission, however, referred the matter to this judge to resolve substantial factual issues and the matter was ultimately settled. See *Total Fitness,* 28 S.R.R. 1462 (ALJ), approval of settlement agreement, finalized June 6, 2000 (FMC).

[14] As noted earlier, on July 6, 2003, respondent filed a reply to the motion for summary judgment. It does not appear, however, that respondent addressed the petition for attorney's fees, which it had the right to do.

Evidence Submitted in Support of the Petition

The Commission's relevant rule governing awards ofattorney's fees (46 C.F.R. 502.254) was promulgated in *Attorney's Fees in Reparation Proceedings,* 23 S.R.R. 1698 (1987). It is based upon the so-called "lodestar" method which determines reasonable attorney's fees by multiplying reasonable hours by the customary attorney's rates in the particular community for the type of work performed. *(Id.)* In *Hensley v. Eckerhart,* 46 1 U.S. 424,433 (1983), the Supreme Court explained:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed.

In later cases the Supreme Court gave the lodestar figure greater finality by holding that the lodestar calculation is presumed to be reasonable and that there is a "strong presumption" that the lodestar figure represents the reasonable fee called for by a statutory fee-shifting provision. See *Blum v. Stenson,* 465 U.S. 886,897 (1984); and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Azr, 478* U.S. 546, 565 (1986).

In Commission cases, successful complainants typically submit billing records from the law firms showing the time spent on the case and by what persons and provide some evidence of the customary charges by attorneys doing this sort of work in the community. *See, e.g., Tampa Bay International Terminals, Inc. v. Coler Ocean Independent Lines Company, 28* S.R.R. 1390 (I.D., administratively final, May 2, 2000) ('petition supported by firm's invoices and an affidavit; attorney's fees of over $14,000 awarded).

In the instant case B & W has submitted invoices from the law firm that represented it in prosecuting its complaint against Supertrans plus an affidavit of the managing partner of the firm attesting to the authenticity of these invoices and the fact that the hourly rates are commensurate with the customary fees charged in the Washington, D.C. market for such services that were provided by the two attorneys who worked on the case who enjoy years of experience and a sound reputation. *See National Ass'n of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1326 (D.C. Cir. 1982) ("the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate."). The four invoices attached to the petition show that for professional services rendered by these two attorneys the total fee amounts to $12,587.50.[15]

Respondent has not challenged this amount before me, although given the opportunity to do so. However, counsel for B & W, anticipating a possible argument by Supertrans, justifies the fact that the fee award ($12,587.50) is far above the money damages (reparations) awarded ($310.98). There is ample case law showing that courts do not limit the size of attorney's fees because the basic money damages awarded are relatively small. B & W's counsel cites the leading case of *City of Riverside v. Rivera,* 477 U.S. 561 (1961), a civil rights case in which the courts awarded $245,000 in attorney's fees although the money damages award was only $33,350. The Court rejected the

[15]The four invoices show that the amounts for professional services were $13 18 50, $2899, $7968, and $402, totaling $12,587.50, for services beginning on July 2, 2002 through October 16, 2002. B & W is not seeking an award of attorney's fees for drafting the motion for summary Judgment or the petition for fees itself, which it could have claimed. *See Tampa Bay International Terminals v. Coler Ocean Independent Lines Co., 28 S* R R. 1390, 1392 (2000). B & W has also excluded certain items which are not fees for professional services but were rather expenses. The affidavit of Mr. Fellman, managing partner of the law frm, states that the hourly fees for the two attorneys who worked on the case, namely, $335 and $230, are the customary fees for such attorneys, one of whom is a senior partner with over thirty years' experience, and the other, a senior associate with eight years' experience. This statement is unrefuted and based upon previous cases involving claims for attorney's fees, I find it to be credible. The invoices show that the time spent by these two attorneys related to the preparation of the complaint and subsequent litigation. B & W has waived the items mentioned above and other claims in order to expedite a final decision because Supertrans has now closed its NVOCC business and B & W fears that there will be additional claims against Supertrans's bond See Petition for Attorney's Fees at 3 n.2.

argument that the size of the award of attorney's fees should be proportionate to the damages awarded. There are numerous other cases in which awards of attorney's fees have far outstripped awards of money damages. *See* 10 *Moore's Federal Practice* (3d ed.), sec. 54.190[3][c] and cases cited therein.

A mere comparison of fee awards with money damages awards is too simplistic an exercise. Thus, in *Hensley v. Eckerhart,* cited above, 461 U.S. at 435, the Court stated that the lower court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Further on, the Court stated that "[t]he result is what matters." *(Ibid.)* In the instant case, measuring B & W's success as merely obtaining a monetary award of $3 10.98 does not tell the whole story. As noted above, B & W filed its complaint at a time when the goods had not been released in Singapore, goods worth almost $25,000, and B & W had asked for an order that Supertrans release the goods. Supertrans did release the goods some three weeks after service of the complaint. Thus, B & W's total relief is not merely an award of $3 10.98. Moreover, B & W has dropped its earlier claims for pre-complaint attorney's fees which were incurred over many months while B & W was striving to persuade Supertrans to release the shipment in Singapore and B & W has not sought attorney's fees for the time spent in preparing the motion for summary judgment and the petition for attorney's fees itself. Finally, B & W has helped the Commission enforce the Shipping Act, which is an objective that serves the public interest. As explained in 10 *Moore's Federal Practice,* cited above, sec. 54.190[3][c] at 54-458, the Supreme Court's decision in *City of Riverside v. Rivera* has been applied by the courts to all fee-shifting

statutes, not just those in civil rights cases. For all these reasons I find an award of $12,587.50 to be reasonable and, subject to possible review by the Commission or otherwise, it is hereby awarded.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
January 8, 2003